IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DONOVAN MUSKETT,

Movant,

vs. NO.: 13-CR-00980 MCA
16-CV-00596 MCA/SMV

UNITED STATES OF AMERICA,

Respondent.

REPLY TO GOVERNMENT'S RESPONSE

Donovan Muskett, Defendant, by and through undersigned counsel Aric G. Elsenheimer, files this reply to the government's motion to enforce appellate waiver and response to defendant's motion pursuant to 28 USC § 2255.

I. Procedural Posture

On June 16, 2016, Mr. Muskett filed a motion to vacate his sentence under 28 U.S.C. § 2255. (Doc. 56). Mr. Muskett argued that the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015) invalidates the residual clause of 18 U.S.C. § 924(c) and that his sentence is unconstitutional and should be vacated. The government responded to this motion on August 15, 2016. This reply is due on October 3, 2016. (Doc. 65).

II. Argument

The Supreme Court's decision in *Johnson* struck down the ACCA's residual clause as unconstitutionally vague. Under *Johnson*, § 924(c)'s materially indistinguishable residual clause must similarly be stricken as unconstitutional. The only remaining "crime of violence" under 924(c) is the narrow force clause. Despite the government's efforts to argue otherwise, assault with a dangerous weapon under 18 U.S.C. § 113(a) does not qualify as a crime of violence under the force clause.

A. *Mr. Muskett's claim is not procedurally barred.*

The government argues that Mr. Muskett's claim is procedurally barred because he did not raise it on direct appeal and there is no excuse for this failure. Contrary to the government's argument, Mr. Muskett can demonstrate both cause and prejudice for his failure to raise this claim on direct appeal. As the government points out, a petitioner can establish "cause" by showing that "the factual or legal basis for a claim was not reasonably available" at the time of direct appeal. (Doc. 63 at 5 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Mr. Muskett was sentenced in March of 2014. At the time of his sentencing, the Supreme Court had twice ruled that the residual clause of the ACCA was not unconstitutionally vague. *See Sykes v. United States*, 564 U.S. 1, 15-16 (2011); *James v. United States*, 550 U.S. 192, 210, n. 6 (2007). The fact that the Supreme Court has conclusively established the issue to be closed is more than sufficient to excuse a failure to raise the issue. To hold otherwise would require every attorney to raise every issue the Supreme Court has already ruled against, regardless of the vast expenditure of resources such a rule would entail. It is worth pointing out that in *Johnson*, the defendant did not challenge the residual clause in his original briefing. It was only after the first oral argument that the Supreme Court requested supplemental briefing on the constitutionality of the residual clause, heard oral argument on the residual clause issue, and ultimately struck down that clause. *See* Lyle Denniston, *Court orders new look at armed criminal law*, SCOTUSblog (Jan. 9, 2015, 5:53 PM), http://www.scotusblog.com/2015/01/court-orders-new-look-at-armed-criminal-law/.

Additionally, Mr. Muskett is prejudiced by this because the invalidation of the residual clause of the ACCA, and by extension the invalidation of the materially indistinguishable residual clause of § 924(c), leaves him convicted under an unconstitutional statute. Mr. Johnson received an 84 month sentence in a case that would have otherwise had a sentencing guidelines range of 33-41 months. A sentence resting on an unconstitutional statute that is twice the period of time of the *high* end of the otherwise applicable guidelines constitutes prejudice.

In addition to the "cause and prejudice" exception to procedural default, there is also an "actual innocence" exception. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). Because, as Mr. Muskett contends, *Johnson* invalidates § 924(c)'s residual clause and his conviction for assault with a dangerous weapon does not fall within the force clause, Mr. Muskett is innocent of the charge under § 924(c) and his conviction should be vacated.

B. Johnson *invalidates section 924(c)'s residual clause*

The government argues that section 924(c)(3) differs from the ACCA's residual clause in several respects. First, the government argues that the "list of enumerated crimes and an 'otherwise' provision" in the ACCA residual clause complicates the interpretation of "serious potential risk" because each of the enumerated crimes---burglary, arson, extortion, and crimes involving explosives--- were "far from clear in respect to the degree of risk each poses." (Doc. 63 at 8 (quoting *Johnson*, 135 S.Ct. at 2558.)). The government's second argument is that the slight differences between the ACCA and 924(c) rescues 924(c)'s residual clause from the vagueness that proved fatal to that of the ACCA. According to the government, the term "physical injury" in the ACCA and the term "physical force" in 924 have "real constitutional difference." (Doc. 63 at 9).

These two textual arguments have been resolved by the Tenth Circuit's decision in *Golicov v. Lynch*, No. 16-9530 (10th Cir. Sept. 19, 2016).[1] In *Golicov*, the Tenth Circuit held that

[1] The Tenth Circuit's decision in *Golicov*, is limited to 16(b)'s residual clause and the Court offers "no opinion on [924(c)'s] constitutionality or upon any distinctions that may or may not

Johnson invalidates the residual clause of 8 U.S.C. § 16(b). With regard to the textual differences between the ACCA and 16(b), the Tenth Circuit observed that although the phrases "physical injury" and "physical force" "vary somewhat" "the fact remains that they are both 'abstractions all the same.'" *Golicov*, No. 16-9530 at 17 (quoting *Shuti v. Lynch, --- F.3d ---, 2016 WL 3632539 *7*).[2]

Similarly, with regard to the government's argument that the absence of an enumerated clause somehow rescues § 924(c)'s residual clause, the Tenth Circuit reasons that the absence of an enumerated clause "does not serve to meaningfully distinguish § 16(b) from the ACCA's residual clause because the enumeration of specific crimes in the ACCA's residual clause was not one of the 'two features of the residual clause' . . . 'that conspired' in the Supreme Court's view, 'to make it unconstitutionally vague.'" *Golicov*, No. 16-9530 at 7-18 (quoting *Johnson*, 135 S.Ct. at 2557). Thus, the enumerated clause was not "'determinative of the Court's vagueness analysis.'" *Id.* (quoting *Shuti*, 2016 WL 3632539.

In addition to these textual arguments, the government also argued that the "narrower and clearer" residual clause of section 924(c) "contains a temporal qualifying limitation of occurring in the course of committing the offense." (Doc. 63 at 10). The government's argument about the "narrower and clearer" residual clause of § 924(c) has two flaws. First, this argument ignores the language of section 924(c). Section 924(c)(3)(B) specifically defines as a crime of violence one that "by its nature, involves substantial risk that physical force against the person or property of

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exist between it and § 1101(a)(43) or § 16(b)." Regardless of *Golicov's* limited holding, it at least resolves the textual arguments advanced by the government regarding *Johnson*'s inapplicability to § 924(c).

[2] On September 29, 2016, the Supreme Court granted certiorari in *Lynch v. Dimaya*, (15-1498), on the issue of whether or not the residual clause of 18 U.S.C. § 16(b) is unconstitutionally vague.

another may be used in the course of committing the offense." The clause "by its nature" contains no "temporal qualifying limitation" that saves residual clause. Indeed, the language of 924(c)(1)(A) itself applies to anyone who uses or carries a gun "during and in relation to" a "crime of violence." There is no temporal qualifying limitation in such a statute. The government's legal alchemy in attempting to find one is belied entirely by the statutory language of section 924(c). *See Golicov*, 16-9530 at 13 ("Similar to the ACCA's residual clause, § 16(b), through its use of the phrase 'by its nature,' 'directs our focus to the offense of conviction' and thus 'requires us to look to the elements and nature of the offense of conviction, rather than to the particular facts relating to the [defendant's] crime.'" (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004))).

Such an analysis also flies in the face of the categorical and modified categorical approach, the analytical framework that applies to § 924(c). *See United States v. Serafin*, 562 F.3d 1105, 1107 (10th Cir. 2009) (applying the categorical approach to section 924(c)). The categorical approach proceeds from the generic definition of a particular offense, not the underlying conduct. To say that 924(c)'s residual clause is saved because it is limited to the course of committing the offense implies that the factfinder should review the conduct underlying the offense, an analytical step not permitted under the categorical and modified categorical approach. Moreover, the jury instructions for a violation of § 924(c) provide the following as the first element: "the defendant committed the crime [name of crime], [as charged in count ___ of the indictment.] You are instructed that [name of crime] is a [drug trafficking crime] [crime of violence]". Based on these jury instructions, it is clear that the jury does not resolve whether a particular crime is or is not a "crime of violence." This is a decision for the judge, a fact about which the parties may litigate pretrial or at a Rule 29 motion. But the jury has absolutely no role in the question of whether or not a crime is or is not a "crime of violence."

C. ***The crime of assault with a dangerous weapon is not a crime of violence.***

The government argues, in the alternative, that even if *Johnson* invalidates section 924(c)'s residual clause, the crime of assault with a dangerous weapon, the predicate offense for Mr. Muskett's section 924(c) conviction, remains a crime of violence because it falls within the "force" clause. The government contends that the element of "intent to do bodily harm" "makes that element include the use of physical force against a person." (Doc. 63 at 11). To support this argument, the government points to *United States v. Castleman*, a recent Supreme Court case that, in the government's view, provides guidance "on what it means to use physical force." (Doc. 63 at 12). The government contends that under *Castleman*, the use of physical force encompasses both direct and indirect conduct that leads to harm. According to the government, in *Castleman*, the Supreme Court "squarely rejected the argument that 'one can cause bodily injury without the use of physical force.'" (Doc. 63 at 13 (*quoting Castleman*, 134 S.Ct. at 1414)).

Such a proposition is odd, given that the majority opinion in *Castleman* expressly reserved the question of whether bodily injury necessitates "violent force." As the majority observed "Justice SCALIA's concurrence suggests that [bodily injury] necessitates violent force, under *Johnson*'s definition of that phrase. But whether or not that is so---a question we do not decide---these forms of injury do necessitate force in the common-law sense." 134 S.Ct. at 1414. *See United States v. Rice*, 813 F.3d 704, 707 (8^{th} Cir. 2016) (Kelly, dissenting) (discussing the limitations on the holding in *Castleman* and *Castleman's* inapplicability to resolving the "use of force" under the career offender definition of a "crime of violence").

In short, reliance on *Castleman* is fundamentally misplaced. The Supreme Court's decision in *Castleman* is limited exclusively to the definition of the term "use of . . . physical force" as it is used in defining the term "misdemeanor crime of domestic violence" under 18

U.S.C. 922(g)(9). Like the term crime of violence in the ACCA, a misdemeanor crime of domestic violence includes offenses that have "as an element, the use or attempted use of physical force." 18 U.S.C. 922(a)(33)(A)(ii). But unlike the ACCA, the Supreme Court interpreted the term "use of . . . physical force" under 922(g)(9) to be far broader than the same term as it is used in the ACCA. According to the Court, "[w]e declined to read the common-law meaning of 'force' into ACCA's definition of a 'violent felony,' because we found it a 'comical misfit with the defined term.'" *Castleman*, 134 S.Ct. 1405, 1410 (2014). In *Castleman*, in construing the term misdemeanor crime of domestic violence, the Court observed that with a misdemeanor crime, "the "common-law meaning of 'force' fits perfectly: The very reasons we gave for rejecting that meaning in defining a 'violent felony' are reasons to embrace it in defining a 'misdemeanor crime of domestic violence.'" *Id.* According to the Court "Whereas it was 'unlikely' that Congress meant to incorporate in the definition of a 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor . . . it is likely that Congress mean to incorporate that misdemeanor-specific meaning of 'force' in defining a 'misdemeanor crime of domestic violence.'" *Id.* at 1411.

Castleman does nothing to change the law in the Tenth Circuit that a person can cause bodily injury without the use of violent force. *See Rice*, 813 F.3d 704 (Kelly, dissenting) ("A number of courts and judges, including a clear plurality of the courts of appeals, have concluded that a person may cause physical or bodily injury without using violent force."). In *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005), the Tenth Circuit held that an element requiring the causing of bodily injury is not enough to qualify as the use of force. *Perez-Vargas* involved a Colorado third degree assault statute under which "assault occurs when the defendant 'knowingly or recklessly causes bodily injury to another person or with criminal negligence he causes bodily injury to another person by means of a deadly weapon.'" *Perez-Vargas*, 414 F.3d at 1285 (quoting C.R.S. § 18-1-901(3)(c)). The Court found several examples of conduct that would violate the statute but not involve the use of force. The court noted that, for example, "intentionally exposing someone to hazardous chemicals" would qualify as third degree assault but not involve the use or threatened use of force. *Id*. at 1286. This is so because the guidelines provision focused on "the means by which an injury occurs (the use of physical force)" whereas the Colorado statute at issue focused "on the result of the defendant's conduct." *Id.* at 1285.

Such reasoning, and the binding Tenth Circuit precedent in *Perez-Vargas*, obliterates the government's argument that the element of "intent to do bodily injury" in the assault statute underlying Mr. Muskett's § 924(c) conviction "makes that element include the use of physical force against a person." This statute encounters the same problem that faced the Colorado statute at issue in *Perez-Vargas*. The statute focuses on the result of the defendant's conduct---bodily harm---and not on the means through which that bodily harm could be accomplished.

Under the force clause of 924(c), and the other force clauses of similar provisions, there are crimes that involve the use of force and there are crimes that do not involve the use of force. Assault with a dangerous weapon with the intent to do bodily harm does not, in any way, require the use of force. The element of assault does not require the use of force. *See United States v. LeCompte*, 108 F.3d 948, (10th Cir. 1997) ("An assault is any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm."). Based on the language of this statute, and the broad reading of the term "dangerous weapon," the use of a dangerous weapon with intent to cause "bodily harm" could be carried out in a number of ways that do not involve "violent force." *See United States v. Johnson*, 324 F.2d 264, 265 (4th Cir. 1963) ("The main legal contention is that a chair is not a dangerous weapon. While it may not be a dangerous weapon per se . . . almost any object 'which as used or attempted to be used may endanger life or inflict great bodily harm . . . or which, as it is sometimes expressed, ‘is likely to produce death or great bodily harm.”). Lastly, that the statute requires the intent to do bodily harm does not address how that intent is to be carried out. Without the requirement that the intent be carried out with the use of physical force, the statute fails to satisfy the requirements of section 924(c)'s force clause.

The government's counterfactual argument that under Mr. Muskett's interpretation, using a gun would not involve the use of force, fails to appreciate the distinctions involved in the legal analysis of the use of force. The fact that it is just the finger pulling a trigger does not change the fact that the result is the ejection of a projectile at speeds greater than 1000 feet per second smashing into its intended target. This is the use of force. About this there should be no confusion. This is far different from placing poison in someone's coffee, or dropping a chemical into a city water supply. Such activity does not involve the use of force, even though it may wreck as much harm as a gun. Had Congress wanted to prohibit such passive yet harmful activity, it would have done so. For whatever reason, Congress elected not to do so, and instead required the use of "physical force." Statutes that lack a "force" requirement, such as the statute underlying Mr. Muskett's conviction under section 924(c), fail to satisfy the force clause.

III. Response to government's motion to enforce the appellate waiver

The government seeks to enforce the appellate waiver contained in Mr. Muskett's plea agreement. The government appears to concede that if *Johnson* applies to § 924(c) and invalidates that section's residual clause, then the appellate waiver should not be enforced. (Doc. 63 at 16 ("Since Muskett is not entitled to relief under *Johnson*, the United States moves to enforce the appellate waiver.").

As discussed in Mr. Muskett's petition, if the enforcement of a waiver will result in a miscarriage of justice the court may consider the merits of the petition. *United States v. Hahn*, 359 F.3d 1315,1325 (10th Cir. 2004) (*en banc*). To satisfy the miscarriage of justice factor the court held that the "error [must] seriously affect [] the fairness, integrity or public reputation of judicial proceedings [,]" as that test was employed in *United States v. Olono*, 507 U.S. 725,732 (1993)" *Hahn*, 359 F.3d at 1327. In *Hahn* the Tenth Circuit held that a miscarriage of justice occurs if the "sentence exceeds the statutory maximum." *Id.* at 1327 (quoting *United States v. Elliot*, 264 F. 3d 1171, 1173 (10th Cir. 2001)). A corollary to this is that a miscarriage of justice occurs if a statute of conviction is deemed unconstitutional.

Although the sentence here did not exceed the statutory maximum, it was a dramatic increase over the otherwise applicable guideline range. Without the enhancement, Mr. Muskett's sentencing guideline range was 33-41 months. PSR at 12, ¶60). Enforcing a waiver entered before an unanticipated sea change in the sentencing law which would keep the petitioner incarcerated far beyond the otherwise applicable guideline range meets that test. An appeal waiver, and by implication a waiver of collateral attack, will not apply if the sentence violates the law. *See United States v. Gordon*, 480 F.3d 1205, 1209 (10th Cir. 2007) (holding that an appellate waiver did not waive the defendant's right to challenge an illegal restitution order). Clearly, since Mr. Muskett was sentenced under a provision of law declared by the United States Supreme Court to be unconstitutionally vague, his sentence would be illegal.

Wherefore, Mr. Muskett requests that the Court find that the residual clause of 18 U.S.C. § 924(c) is void for vagueness, that the crime of assault with a dangerous weapon is not a crime of violence, vacate Mr. Muskett's conviction, and set this matter for resentencing.

Respectfully Submitted,

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Electronically filed October 3, 2016
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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to the following: Novaline Wilson, Assistant United States Attorney.

Electronically filed October 3, 2016
/s/ Aric G. Elsenheimer
Assistant Federal Public Defender